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Supreme Court of the United States

OCTOBER TERM, 1940

No. 381

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware corporation; AMERICAN-HAWAIIAN STEAMSHIP CORPORATION, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

REPLY BRIEF TO BRIEFS OF INTERVENER-RESPONDENT AND OF RESPONDENTS HULL AND MORGENTHAU, IN OPPOSITION TO THE GRANTING OF WRITS OF CERTIORARI.

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The Government having recognized

"the important and unusual character of this case"

(p. 18 of its Brief), we are taking the liberty of filing a reply brief because of the many inaccuracies in the statements of fact contained in the brief of the respondent, Lehigh Valley Railroad Company.

On page 3 of the Lehigh Valley brief, it is stated:

"The complaint also sought (too late) to enjoin the Secretary of State from certifying the awards."

In other words, the respondent, the Lehigh Valley Railroad Company claims that because the Legal Adviser to the Secretary of State frustrated attempts to serve the complaint until after the certificates were actually signed (R. 318), petitioners lost their right. The complaint was filed at 9:05 A. M. on October 31, 1939 (R. 302), served upon the Secretary of Treasury at about 9:35 A. M. and upon the Legal Adviser to the Secretary of State at 3:15 P. M. on that day (R. 302, 332). Prior to the service upon said Legal Adviser, the Marshal attempted to serve process and was advised to return the next day, but ignoring such advice, he succeeded in effecting service in the afternoon of the same day (see Affidavit of Administrative Assistant, Legal Adviser's Office, Department of State, R. 318). In the meantime, between 9:05 A. M. and 3:15 P. M. these awards, 153 in number, were certified (R. 318).

In view of the fact that the Department of State was on June 23rd and October 25th, 1939 duly notified of the intention of the petitioners to bring the suit (R. 303-317), this evasion of service of process on the part of the Department of State (R. 318) does not deprive the petitioners of their rights.

Texas & N. O. R. Co. v. *Northside Belt Ry. Co.*, 276 U. S. 475.

An action is commenced by the filing of the complaint (Civil Procedure Rule 3). Therefore, the statement that the service of process was "too late" is completely unjustified.

It is stated (Lehigh Valley Brief, p. 6), that, under the Agreement of August 10, 1922 (42 Stat. 2200), a commission of three was appointed. The agreement does not provide for such tribunal. The agreement provides (Art. II), that the two governments should each appoint a commissioner, and that only in case of disagreement

shall the umpire, selected by the two governments, function.

Again it is stated (Lehigh Valley Brief, p. 9), that the Commission, on June 3, 1936, set aside its earlier decision of December 3, 1932, but this does not state all the facts.

The decision of June 3, 1936 (R. 140) reads as follows:

> "It is therefore decided, that the Decision of this Commission rendered at Washington on the third of December 1932 be set aside. This decision reinstates the cases into the position they were before the Washington Decision was given. *It has no bearing on the Decision rendered at the Hague and does not reopen the cases as far as that decision is concerned.* Before the Hague Decision may be set aside the Commission must act upon the claimant's petition for rehearing. Whether upon the showing made, the Commission should grant a rehearing, unless Germany shall agree to a different course, must, under the Commission's Decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits." (Italics ours.)

Thus, the decision of June 3, 1936, expressly made the reservation that the original award dismissing the claim shall remain unaffected unless fraud was proved sufficient to justify the granting of a rehearing, after which there would be a rehearing on the merits.

On page 24 of the Lehigh Valley brief it is stated that because the Commission was still functioning, in other words, had not ceased to exist, its awards could be reopened at any time. This statement is contrary to the practice of the Commission which regarded each claim as a separate case, the Commission frequently holding, as pointed out in our previous brief (p. 38), that the rules of the Commission make no provision for a rehearing.

The facts of the case of *Benjamin Weil* (p. 25 of Lehigh Valley brief) are not correctly stated. The application for a rehearing was made before the National Commissioners had concluded their labors. The application was presented to the two commissioners. The history of the case appears more fully in *U. S.* v. *Alice Weil*, 35 Ct. of Clms. Reports, 43. In the footnote is a statement of the material facts of the case.*

Another erroneous statement is found on page 28 of the Lehigh Valley brief. Counsel there tries to give the impression that there was before the Commission the question of the merits of the sabotage claims. The question of the merits, as we have pointed out in our previous brief (p. 6), was expressly reserved until after the decision on the question of rehearing should be granted. One of the questions the Commission was considering at the time of the resignation of the German Commissioner was whether the reopening would be proper "if the new decision on the old and new evidence taken together should be identical in tenor with the Hamburg-Decision" (R. 290). Hamburg-Decision referred to is that of the Commission of October 16, 1930 (R. 260).

This does not authorize the statement that the merits of the claim were before the Commission. It is always proper, upon a motion for a new trial upon the ground of newly discovered evidence, to determine whether the new evidence, taken in connection with the former evidence, would justify a different decision and then, if the motion is granted, to set the matter down for such new trial. No new trial was had herein.

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* Award rendered by the Umpire October 1, 1875 (Vol. 2, Moore's International Arbitrations, p. 1326).

Petition for re-hearing submitted *prior* to retirement of two national commissioners on January 30, 1876.

On January 30, 1876, the two national commissioners had completed their work and retired by the terms of the agreement.

Motion for re-hearing was denied prior to July 31, 1876, for on that date a final award was made (35 Court of Claims, p. 45).

With reference to the quotations with regard to the Jay Treaty of 1794 (*3 Moore, International Adjudications*, Modern Series, p. 170) (Lehigh Valley Brief, p. 29), Judge Moore replied at length in the court below; his reply was summed up by him as follows:

> "The two governments [Great Britain and the United States] concurred in the view that, although the absence of the commissioners, first on one side and then on the other, was deliberate, and was designed to prevent the making of awards, yet it did preclude the making of them, in spite of the fact that they had not resigned and were still in office."

It is also contended (Lehigh Valley Brief, p. 31) that having received benefits under the Settlement of War Claims Act, Germany "could not at any stage thereafter frustrate proceedings before the Commission". This is the concluding sentence of a statement of fact set forth on pages 30-31 of the Lehigh Valley brief and is entirely inaccurate. As indicated in *Deutsche Bank und Disconto-Gesellschaft* v. *Cummings*, 83 F. (2d) 554, 560, reversed on other grounds 300 U. S. 115, the enactment of the Settlement of War Claims Act was based upon the non-confiscatory policy of the United States (Senate Report No. 273, 70th Cong. 1st Session, p. 12) together with the desire to satisfy legitimate claims of citizens of the United States against Germany.

The Settlement of War Claims Act was, in fact, based upon an agreement made between former German owners of property and a committee of American nationals with claims against Germany (*Hearings, Committee on Finance*, Jan. 8, 1927, 69th Cong. 2d Session, p. 129).

On pages 30 and 40 of the Lehigh Valley brief it is claimed that the petitioners have been guilty of unnecessary delay. This statement is completely unjustified. The petitioners believe that the so-called sabotage awards are not awards at all, and that the pendency of the sabotage

claims has for many years delayed further payment on the awards represented by the petitioners.

If these so-called sabotage awards are nullities and the sabotage claims unjustified in fact and law, then the petitioners and others similarly situated have been prejudiced. The filing of the petition for certiorari was timely and, therefore, the insinuations of dilatory tactics on the part of the petitioners is completely unwarranted.

On page 4 of the Government brief it is stated that the Special Deposit Fund created by the Settlement of War Claims Act of 1928 (45 Stat. 254) consists of 20% of the seized property of former German enemy nationals, together with funds contributed by the German Government, but omits to state that the fund also consisted of an appropriation made by Congress of more than $86,000,000 (Report of Secretary of Treasury, June 30, 1939, p. 76), representing the monies appropriated to pay the claims of former German ship and patent owners and awards of the Mixed Claims Commission (Sections 3 and 4 of Settlement of War Claims Act).

On page 5 of the Government's brief it is stated that on June 3, 1936 the Commission rendered a decision, concurred in by the German Commissioner, setting aside its decision of December 3, 1932, denying a rehearing, but the reservation that prior thereto other dismissals of the claims remained intact is not mentioned (see p. 3 of this brief).

On page 6 of the Government's brief it is stated that the German Commissioner addressed a note to the Umpire declaring that the Commission was without power to reopen the case and that he was therefore withdrawing from the Commission. His reasons for withdrawing from the Commission are set forth at pages 145 to 147 of the Record and that ground is not mentioned therein.

On page 7 of the Government's brief the note of October 18, 1939, from the Secretary of State is referred to as a basis for the argument that the question at issue cannot be dealt with because it is purely "political". In

that note (R. 217) the Secretary of State wrote as follows:

> "* * * since the Department is without jurisdiction over the Commission I consider that it would be highly inappropriate for it to intervene directly or indirectly in the work of the Commission or to endeavor, in the slightest manner, to determine the course of its proceedings."

It seems to follow from this language that when the Secretary of State certified the so-called awards to the Treasury, he regarded himself as performing a purely ministerial and in no sense, a judicial act.

Certifications in Department practice are ministerial as the regulations printed in the Appendix show.

On page 10 of the Government's brief it is asserted that the petitioners claim that they have standing to sue to mandamus the Secretary of the Treasury. The petitioners also claim that they are entitled to a declaratory judgment (R. 11), similar to that obtained by the plaintiff in the case of *Perkins* v. *Elg*, 307 U. S. 325.

On page 11 of the Government's brief it is asserted that the present controversy is solely one between the United States and Germany. The present controversy is not between the United States and Germany. It is a controversy between two groups of claimants, the claimants represented by the petitioners asserting that the Special Deposit Account is about to be depleted by payment of so-called awards which are mere nullities and, therefore, the petitioners are entitled to a declaration adjudicating that these so-called sabotage awards are mere nullities and do not come within the provisions of the Settlement of War Claims Act appropriating a certain fund to the payment of only valid awards, which awards cannot be validated by certificates of the Secretary of State.

To sum up, the Commission cannot conclusively pass upon its own jurisdictional errors and irregularities; the

Secretary of State never purported to pass upon these errors and irregularities; the Secretary's certification was purely ministerial; by such ministerial certification he cannot foreclose the property rights of American citizens claiming that a treaty has been violated, and the very speed with which the awards were certified shows the absence of deliberation.

CONCLUSION.

Therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix.

Code of Federal Regulations of the United States of America, Title 22 Foreign Relations, Chapter I, Department of State, Subchapter A, Part 8:

PART 8—AUTHENTICATION OF CERTIFICATES

Section 8.1 Secretary of State: Cordell Hull. The Chief Clerk and Administrative Assistant, or in his absence the Acting Chief Clerk and Administrative Assistant, is hereby authorized to authenticate certificates under the seal of the Department of State for and in the name of the Secretary of State. The form of authentication shall be as follows: "In testimony whereof, I, Cordell Hull, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk and Administrative Assistant (or Acting Chief Clerk and Administrative Assistant) of the said Department, at the City of Washington, in the District of Columbia this.....day of....., 19... Cordell Hull, Secretary of State. By.....Chief Clerk and Administrative Assistant (or Acting Chief Clerk and Administrative Assistant)."** [Dept. Order 546, Mar. 6, 1933]

8.2 Acting Secretary of State: R. Walton Moore. The Chief Clerk and Administrative Assistant, or in his absence the Acting Chief Clerk and Administrative Assistant, is hereby authorized to authenticate certificates under the Seal of the Department of State for and in the name of the Acting Secretary of State. The form of authentication shall be as follows: "In testimony whereof, I, R.

**§§ 8.1 to 8.5, inclusive, issued under the authority contained in R.S. 161; 5 U.S.C. 22.

Walton Moore, Acting Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk and Administrative Assistant (or Acting Chief Clerk and Administrative Assistant) of the said Department, at the City of Washington, in the District of Columbia, this.....day of ....., 19... R. Walton Moore, Acting Secretary of State. By....., Chief Clerk and Administrative Assistant (or Acting Chief Clerk and Administrative Assistant)."** [Dept. Order 597½, Aug. 25, 1934]

8.3 Acting Secretary of State: Sumner Welles. The Chief Clerk and Administrative Assistant, or in his absence the Acting Chief Clerk and Administrative Assistant, is hereby authorized to authenticate certificates under the Seal of the Department of State for and in the names of the Acting Secretary of State. The form of authentication shall be as follows: "In testimony whereof, I, Sumner Welles, Acting Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk and Administrative Assistant (or Acting Chief Clerk and Administrative Assistant) of the said Department, at the City of Washington, in the District of Columbia, this..... day of....., 19... Sumner Welles, Acting Secretary of State. By....., Chief Clerk and Administrative Assistant (or Acting Chief Clerk and Administrative Assistant."* [Dept. Order 687, May 24, 1937]

8.4 Fees—(a) Copy duly authenticated. For a copy from the records duly authenticated a fee of 10 cents for each sheet of 100 words, as required by law (R.S. 213; 5 U.S.C. 166), shall be collected. This applies to copies however made and includes typewritten, photographic, and photostatic copies.

** For statutory citation, see note to § 8.1.
* For statutory citation, see note to § 8.1.

(b) Comparing a copy. Comparing a copy which has already been made, whether in written or printed form, with the original record before authentication shall be construed as making out a copy and the same fee shall be collected.

(c) Copy already made out and compared. No fee shall be charged for furnishing an authenticated copy of a record when such copy has already been made out and compared with the original record—that is to say, where no service of either copying or comparing has been performed.* [Dept. Order 282, Dec. 6, 1923]

8.5 When certification is desired for unlawful purpose. The Department will not certify to a document when it has good reason to believe that the certification is desired for an unlawful or improper purpose. It is, therefore, the duty of the authenticating clerk to examine not only the document which the Department is asked to authenticate but the fundamental document to which previous authentication, or authentications, may have been affixed.* [Dept. Order 235, Dec. 15, 1921]

* For statutory citation, see note to § 8.1.